TAN KIAN HUA

v.

COLOUR IMAGE SCAN SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: D4-26-26-2002]
1 MAY 2004

COMPANY LAW: *Members' rights - Oppression - Whether there was total disregard of rights of minority shareholder - Prejudicial acts - Whether amounted to oppression - Remedies available - Companies Act 1965, s. 181*

In the present case concerning the issue of oppression of the petitioner's rights as a shareholder of the company, the petitioner sought the following prayers: (i) that the second, third, fourth and fifth respondents ('the respondents') give full account and disclosure of the financial transactions by the company from 22 February 2002 to the date of this order; or further/in the alternative (ii) that the company be wound-up by the court under the provisions of the Companies Act 1965; (iii) that one Mr. Wong Weng Foo be appointed as the liquidator of the company; (iv) that the costs of this application be paid to the petitioner by the respondents; and (v) that the parties be given liberty to apply to the court for consequential orders. The main issue requiring determination was whether there was oppression of the petitioner's rights under s. 181 of the Companies Act 1965.

Held (for the petitioner):

[1] On the facts, there was oppression and total disregard by the majority shareholders of a minority shareholder's interests. This court must intervene and grant the reliefs sought by the petitioner in order to prevent the respondents from continuing to disregard the petitioner's interest and committing acts on behalf of the company that would be prejudicial to the petitioner. It must be borne in mind that the petitioner had been prevented from participating in the management of the company despite an implied agreement between the second, third and fourth respondents together with the petitioner as the founding partners and directors of the company. Furthermore, there was evidence of a complete breakdown of mutual confidence and good faith between the petitioner and the second respondent, who was described as the chief protagonist in the whole episode. In this situation, unless the respondents (being the majority) "bought out" the

petitioner, there was no other alternative open to the petitioner except to seek an order to wind-up the company and for a liquidator to be appointed accordingly. (pp 195 c-f & 196 c)

[Petitioner's prayers granted.]

Case(s) referred to:

Beh Chun Chuan v. Paloh Medical Centre Sdn Bhd & Ors [1999] 7 CLJ 1 HC ***(refd)***

Eric Lau Man Hing v. Eramara Jaya Sdn Bhd & Ors [1998] 3 CLJ Supp 126 HC ***(refd)***

Irvin & Johnson Ltd v. Oelofes Fisheries Ltd [1954] 1 South African Law Reports 231 ***(refd)***

Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors And Another Application [1994] 2 MLJ 789 ***(refd)***

McWilliam & Anor v. LJR McWilliam Estates Pty Ltd [1990] 8 ACLC 1 ***(refd)***

Morgan v. 45 Flers Avenue Pty Ltd [1987] 5 ACLC 222 ***(refd)***

Phosphate Co-operative Co of Australia Ltd v. Shears [1987] 12 ACLr 649 ***(refd)***

Re A Co [1983] Ch 176 ***(refd)***

Re A Company (No: 005134 of 1986), ex p Harris [1989] BCLC 383 ***(refd)***

Re Bright Pine Mills Pty Ltd [1969] VR 1002 ***(refd)***

Re Chloride Eastern Industries [1995] 4 MLJ 95 ***(refd)***

Re Coliseum Stand Car Service Ltd; Abdul Khalik v. Mohamed Jee & Ors [1972] 1 MLJ 109 ***(refd)***

Re Dalkeith Investments Pty Ltd [1985] 3 ACLC 74 ***(refd)***

Re Gee Hoe Chan Trading Co Pte Ltd [1992] 1 CLJ 268; [1992] 4 CLJ (Rep) 383 HC ***(refd)***

Re Jermyn Street Turkish Baths Ltd [1971] 1 WLR 1042 ***(refd)***

Re Jermyn Street Turkish Baths Ltd [1971] 3 All ER 184 ***(refd)***

Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 2 MLJ 227 ***(refd)***

Re Novabron Pty Ltd (No 2) [1986] 11 ACLR 279 ***(refd)***

Re Overton Holdings Pty Ltd [1984] 2 ACLC 777 ***(refd)***

Re Posgate & Denby (Agencies) Ltd [1987] BCLC 8 ***(refd)***

Re Senson Auto Supplies Sdn Bhd [1988] 1 MLJ 326 ***(refd)***

Re Sin Lee Sang Sawmill (Miri) Sdn Bhd; Leong Thong & Anor v. Chong Thim & Ors [1990] 1 MLJ 250 ***(refd)***

Re Spargos Mining NL [1992] 3 ACSR 1 ***(refd)***

Re Tivoli Freeholds Ltd [1971-1973] CLC 40-027 ***(refd)***

Re Tong Eng Sdn Bhd [1994] 1 MLJ 451 ***(refd)***

Re Tri-Circle Investment Pte Ltd [1993] 2 SLR 523 ***(refd)***

Scottish Co-operative Wholesale Society Ltd v. Meyer [1959] AC 324 ***(refd)***

Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 PC ***(refd)***

Varusay Mohamed Shaik Abdul Rahman v. SVK Patchee Bros (M) Sdn Bhd [2002] 3 CLJ 741 CA ***(foll)***
Wayde v. New South Wales Rugby League Ltd [1985] 3 ACLC 799 ***(refd)***
Wayde v. New South Wales Rugby League Ltd [1985] 10 ACLR 87 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 181, 218(1)(a), (i), form 24

Companies Act 1985 [UK], s. 459

For the petitioner - Wong Rhen Yen; M/s Dennis Nik & Wong
For the respondents - Ch'ng Kim Hock; M/s Ch'ng Kim Hock & Assocs

Reported by Suresh Nathan

JUDGMENT

Abdul Malik Ishak J:

Oppression – Bird's Eye View

Oppression figures prominently in this judgment. The critical test to show oppression is whether there is commercial unfairness (*Morgan v. 45 Flers Avenue Pty Ltd* [1987] 5 ACLC 222, [1986] 10 ACLR 692, 704). According to the case of *Irvin & Johnson Ltd v. Oelofes Fisheries Ltd* [1954] 1 South African Law Reports 231, 243, oppression is described as something done against a person's will and in his despite. It is not something done with the acquiescence or consent, and still less is something done with his co-operation. And according to *McWilliam & Anor v. LJR McWilliam Estates Pty. Ltd* [1990] 8 ACLC 1, 097, [1990] 20 NSWLR 703, it is oppressive for a member of a board of directors using his or her skills to secure an advantage, at least beyond a certain limit. And this is so notwithstanding the fact that the director concerned is in the majority or in the minority.

Now, the acts of oppression must result from "some overbearing act or attitude on the part of the oppressor" (*Re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042, 1060; and *Re Tivoli Freeholds Ltd* [1971-1973] CLC 40-027, 27, 238, [1972] VR 445, 453). And that "oppression may occur even though all members of a company are treated equally … The unfairness may arise, for example, by reason of an advantage to a parent company."

There is a respectable precedent on oppression in the leading case of *Scottish Co-operative Wholesale Society Ltd v. Meyer* [1959] AC 324. That was a case where the company was formed to trade in yarn and cloth by a majority shareholder who wove the cloth, and a minority shareholder who held licences to buy yarn. When licensing control ended, the majority shareholder withheld supplies of cloth and through its nominee directors allowed business to fall away, refusing also to buy the minority shares. This was held to be oppression, and an order was made that the controlling shareholder buy the minority's

shares. And according to McPherson J in *Re Dalkeith Investments Pty Ltd* [1985] 3 ACLC 74, the value of the shares should be assessed "without reference to the matters that give rise to the complaint of oppression".

Oppression takes many forms. Thus, an oppression may occur simply by way of an inertia just like the case of *Re Bright Pine Mills Pty Ltd* [1969] VR 1002. That was a case where the directors ignored business opportunities that the company could have taken up so that another business in which they were interested could take advantage of them. Oppression too can even affect all the members of the company equally. A classic example would be the case of *Re Overton Holdings Pty Ltd* [1984] 2 ACLC 777. In that case, the court held that a member was held to have status to sue where a director had caused the company:

(1) to borrow money it did not need;

(2) to lend to a company in which it had no financial interest and on a commercially unrealistic and unsecured terms.

The court granted status to sue for that member even though the act was to the detriment of all the shareholders.

So much for the brief discourse on the law and I shall revert to it in the later part of this judgment. I will now allude to enclosure one (1), which was the pivotal application of the petitioner here.

Enclosure One (1)

By way of enclosure one (1) at para. 20, the petitioner sought for the following prayers:

20. Your Petitioner, therefore humbly prays as follows:

(1) (i) that the 2nd, 3rd, 4th and 5th Respondents be ordered to purchase the Petitioner's 30% shareholding in Colour Image Scan Sdn. Bhd. (Company No: 504063-M) for the price to be determined by a professional accountant or any other qualified person to be appointed by this Honourable Court;

(ii) that the 2nd, 3rd, 4th and 5th Respondents do, within 7 days of the Order of this Court, give full account and disclosure of the financial transactions by the company from 22.2.2002 to the date of this Order;

Further and/or in the alternative

(2) (i) that Colour Image Scan Sdn. Bhd. (Company No: 504063-M) be wound up by the Court under the provisions of the Companies Act 1965;

(ii) that the Official Receiver be and is hereby appointed as the Provisional Liquidator of the Company;

(iii) in the alternative, any other qualified persons be and is hereby appointed as the Liquidator of the Company;

(3) that the 2nd, 3rd, 4th and 5th Respondents be ordered to pay to the Petitioner damages to be assessed with interest at the rate (of) 8% per annum from the date of this Petition to (the) date of full payment;

(4) that the costs of this application be paid to the Petitioner by the 2nd, 3rd, 4th and 5th Respondents;

(5) (that) the parties be given liberty to apply to the Court for consequential orders; (and)

(6) any further and/or other order that this Honourable Court may consider appropriate.

At the outset, Mr. Wong Rhen Yen, the learned counsel for the petitioner, magnanimously informed this court that he was not pursuing with prayer (1) (i) of para. 20 of enclosure one (1) as well as prayer (3) of para. 20 of enclosure one (1). That was indeed a magnanimous gesture. I took note of these concessions.

Facts Of The Case

The first respondent by the name of Colour Image Scan Sdn Bhd (hereinafter referred to as "the company") was on 27 January 2000 incorporated under the Companies Act 1965 as a private company limited by shares. The registered office of the company is located at no: 35-1, Jalan 1/137B, Resource Industrial Centre, Jalan Kelang Lama, 58000 Kuala Lumpur. The authorised capital of the company is RM100,000 divided into 100,000 shares of RM1 each. The amount of the capital paid up or credited as paid up is said to be in the sum of RM100,000. The objects for which the company was established are, *inter alia*, for processing of artwork and production house for colour separation (see the copy of the search report from the Registrar of Companies marked as exh. "TKH2" of encl. 2). For the last ten years and prior to forming the said company on 27 January 2000 with the second, third and fourth respondents, the petitioner was employed in the business of colour separation for publishing and production house. The petitioner is said to be active and has many overseas clients like PPDL-Hong Kong (Macmillan), Pearson Education North Asia Ltd, Bookpac Pte Ltd (Singapore), Pearson Education Malaysia, etc, etc. It is ideal to refer to the copy of the letter dated 26 July 2002 from Peninsula Production & Distribution Ltd (also known as PPDL-Hong Kong Macmillan) and marked as exh. "TKH-19" of encl. 5. Now, sometime in September 1999, whilst the petitioner was working in a company known as Colour Dimension Sdn Bhd as a sales executive, the petitioner was introduced to the second respondent by

his former boss by the name of Mr. Ng Guan Fong. And sometime in the month of December 1999, the second respondent proposed to the petitioner to start a business venture to engage in the business of colour separation for production and publishing house. After numerous discussions and negotiations the following terms were agreed between the second respondent and the petitioner and these terms were carried out and put into motion:

(1) it was agreed between the parties that a private limited company should be formed for the said purpose and hence the company was incorporated on 27 January 2000 (see the copy of the Memorandum and Articles of Association marked as exh. "TKH-3" of encl. 2 at p. 30 to p. 36);

(2) it was agreed that the second respondent and the petitioner will be the directors of the company and they were supposed to participate in the management of the company;

(3) the second respondent also proposed that the third and the fourth respondents – being his brother and sister respectively, be drafted into the company as inactive and silent partners;

(4) at the material time, it was further agreed between the parties that the percentage of shareholding of the company shall be as follows:

(a) the petitioner at 30%;

(b) the second respondent at 40%;

(c) the third respondent at 15%; and

(d) the fourth respondent at 15% (see the copy of Form 24 of the Companies Act 1965 dated 26 September 2000 marked as exh. "TKH-4" of encl. 2 at p. 50 to p. 58 thereof);

(5) the four personalities listed and named as in para. (4) above would be elected as the directors of the company with the second respondent as the managing director;

(6) it was also agreed that the paid up capital of the company shall be RM100,000 and that each of the four personalities listed and named as in para. (4) above shall subscribe to the same in proportion to their agreed shareholding as stated in para. (4) above;

(7) at that point of time, the petitioner did not have sufficient funds to contribute towards the shareholding and the second respondent proposed that the petitioner should apply for an overdraft facility from a financial institution and that the house which the petitioner co-owned with his wife

would be used as a collateral; and in regard to the issue of interest which will be imposed by the financial institution on the overdraft facility, the second respondent agreed that the company shall reimburse the petitioner the said interest in question;

(8) that sometime in June 2000 the petitioner obtained a term loan of RM30,000 and an overdraft facility of RM60,000 (hereinafter referred to as the said "facility") from the Pacific Bank Berhad (hereinafter referred to as the "bank"); and so as security for the said facility, the petitioner and his wife charged their house to the bank;

(9) that although the petitioner was only required to contribute RM30,000 towards his shareholding of 30% in the company, at the second respondent's request, the petitioner agreed to advance and loan an additional sum of RM30,000 to the company from the said facility free of interest and repayable upon demand; and with that kind of understanding and upon the said facility being approved and the conditions for drawdown being met, in the month of July or August 2000 the petitioner then proceeded to credit a sum of RM60,000 (comprising of RM30,000 from the term loan and RM30,000 from the overdraft facility) into the company's bank account in HSBC Bank Malaysia Berhad; and

(10) in order to keep the overheads of the company as low as possible, the second respondent and the petitioner agreed that the company's accounts will be handled by the second respondent's wife by the name of Everlyn Yap Siew Hong and that she would be replaced once the company's financial status has improved.

At first, all went well. The parties were able to get along in a fine manner. And as agreed, the company did reimburse the petitioner a sum of RM210 on a monthly basis from August 2000 onwards for servicing the said facility until the month of October 2001. Towards this end it would be ideal to refer to the copy of the company's payment vouchers marked collectively as exh. "TKH6" of encl. 2 as seen at p. 59 to p. 64 thereof. Events thereafter moved at a fast pace. In the month of June 2000, the petitioner resigned from his previous job to take up a full time employment as the sales director of the company and drawing a salary of RM2,800 per month. Sometime in the month of October 2000, the second respondent informed the petitioner that the second, the third and the fourth respondents had invited the fifth respondent by the name of Mr. Saifuddin bin Abu Bakar to join the company as a shareholder and director. The second respondent also informed the petitioner that the aggregate 30% shareholding of both the third and the fourth respondents would be transferred to the fifth respondent and this was duly carried out (for corroboration, reference

to the copy of Form 24 of the Companies Act 1965 dated 12 October 2000 marked as exh. "TKH-7" of encl. 2 at p. 65 to p. 68 should be referred to). It must be borne in mind that, at all material times, the fifth respondent was made to sign an undated resignation letter as a director of the company in order to safeguard the interests of the second, the third and the fourth respondents (reference to the copy of the undated resignation letter marked as exh. "TKH8" of encl. 2 at p. 69 to p. 70 should also be referred to). Presently there are three shareholders in the company and the percentage shareholding of each of them is as follows:

(i) the petitioner holding 30%;

(ii) the second respondent holding 40%; and

(iii) the fifth respondent holding 30%.

Sales for the year 2000 were extremely good bearing in mind that the company was merely in its first year and it was already making handsome profits. As a result of this good showing, the board of directors of the company decided to allow the directors to claim reimbursement for the instalments of the hire purchase of the cars hired by the directors from the respective finance companies (see a copy of the payment vouchers marked collectively as exh. "TKH9" of encl. 2 at p. 71 to p. 75 thereof). Sometime in August 2001, the board of directors of the company decided to purchase cars for the use of the directors under the hire purchase schemes. So, the petitioner was allowed to use a car known as Proton Waja bearing registration number WHV 2695 (hereinafter referred to as "the said car") wherein the company was the hirer and the petitioner was the guarantor of the hire purchase agreement. At this point of time reference to the hire purchase agreement dated 12 September 2001 and the guarantee of the hire purchase agreement dated 17 September 2001 marked collectively as exh. "TKH10" of encl. 2 at p. 76 to p. 78 would be ideal.

But things did not appear to be going as well as they were expected to be. The petitioner felt oppressed when there was a total disregard for his interest. The petitioner too felt the air of discrimination and prejudice. Bad blood prevailed. The petitioner aired his grievances against the respondents in encl. 2 at paras. 7 to 24 and they may be stated in this manner:

(1) that there was irregular financial transactions by the second, the third and the fourth respondents;

(2) that there was a breach of agreement to repay the loan taken by the petitioner;

(3) that the petitioner was prevented from having access to the company's accounts;

(4) that the petitioner was removed as a director of the company in breach of the agreement;

(5) that dividends were not declared; and

(6) that the petitioner was stripped from enjoying all the benefits of the company and denied access to the office.

I will, in the course of this judgment, allude to the facts in greater detail. In the meantime, I will now, once again, proceed to state the law. I must categorically state that in construing our own s. 181 of the Companies Act 1965, there is no requirement at all to show that it is just and equitable for the company to be wound up before relief can be extended. Our s. 181 of the Companies Act 1965 uses four different tests, namely "oppression", "disregard of interests", "unfair discrimination" and "prejudice". I will now briefly allude to these tests.

(a) Oppression In The Context Of s. 181 Of The Companies Act 1965

It is ideal to refer to s. 181 of the Companies Act 1965 which enacts as follows:

> 181. Remedy in cases of an oppression
>
> (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground:
>
> (a) that the affairs of the directors are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
>
> (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).
>
> (2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may:
>
> (a) direct or prohibit any act or cancel or vary any transaction or resolution;
>
> (b) regulate the conduct of the affairs of the company in future;

(c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company be wound up.

(3) Where an order that the company be wound up is made pursuant to subsection (2) (e) the provisions of this Act relating to winding up of a company shall, with such adaptations as are necessary, apply as if the order had been made upon a petition duly presented to the Court by the company.

(4) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other provision of this Act, but subject to the order, the company concerned shall not have power without the leave of the Court to make any further alteration in or addition to the memorandum or articles inconsistent with the order; but subject to the foregoing provisions of this subsection the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company.

(5) An office copy of any order made under this section shall be lodged by the applicant with the Registrar within fourteen days after the making of the order.

Penalty: One thousand ringgit. Default penalty.

And the true intent and purport of s. 181 of the Companies Act 1965 have been lucidly set out by Lord Wilberforce in the case of *Re Kong Thai Sawmill (Miri) Sdn. Bhd.; Kong Thai Sawmill (Miri) Sdn. Bhd. & Ors. v. Ling Beng Sung* [1978] 2 MLJ 227. There his Lordship writing for the Privy Council with a coram of Lord Wilberforce, Viscount Dilhorne, Lord Salmon, Lord Fraser of Tulleybelton and Sir Garfield Barwick aptly said at p. 228 to p. 229 of the report:

This section can trace its descent from section 210 of the United Kingdom Companies Act, 1948 which was introduced in that year in order to strengthen the position of minority shareholders in limited companies. It also resembles the rather wider section 186 of the Australian Companies Act, 1951. But section 181 is in important respects different from both its predecessors and is notably wider in scope than the United Kingdom section. In sub-section (1)(a) it adds disregard of the interests of members, etc. to oppression as ground for relief in this respect making explicit what was already inherent in the section (see *In re H.R. Harmer Ltd*. [1959] 1 WLR 62, 75). It introduces a new ground in sub-section (1)(b) and, most importantly, in sub-section (2), which sets out the kinds of relief which may be granted, it provides for 'remedying the matters complained of' and states as a specific type of relief that of winding-up of the company.

> Section 210 is differently constructed. Under it, the court is required to find that the facts would justify the making of a winding-up order under the 'just and equitable' provision in the Act, but also that to wind-up the company would unfairly prejudice the 'oppressed' minority. The Malaysian section, on the other hand, requires (under sub-section 1 (a)) a finding of 'oppression' or 'disregard', and then leaves to the court a wide discretion as to the relief which it may grant, including among the options that of winding the company up. That option ranks equally with the others, so that it is incorrect to say that the primary remedy is winding-up. That may have been so before 1948 and even after the enactment of section 210, but is not the case under section 181.
>
> Their Lordships consider it important that courts applying section 181 should do so according to its terms and its purpose and should not regard themselves as necessarily bound by United Kingdom decisions, which are based upon a different section, and in some cases restrictive. The same applies, though with less force, to reliance upon Australian decisions upon section 186.

I say that section 181 of the Companies Act 1965 may be invoked where there is "oppression" of a member or where a member's interests are "disregarded". It may even be invoked where there is a resolution or an act that "unfairly discriminates" against or is "otherwise prejudicial" to a member. Viscount Simonds in *Scottish Co-operative Wholesale Society Ltd v. Meyer (supra)* defined the term "oppression" as "burdensome, harsh and wrongful" by merely taking the dictionary meaning of the word. Buckley LJ defined the word "oppression" in the case of *Re Jermyn Street Turkish Baths Ltd* [1971] 3 All ER 184 (this is another citation apart from the one alluded to earlier) in the following way:

> In our judgment, oppression occurs when shareholders, having a dominant power in a company, either (1) exercise that power to procure that something is done or not done in the conduct of the company's affairs or (2) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company's affairs: and when such conduct is unfair … to the other members of the company or some of them, and lacks that degree of probity which they are entitled to expect in the conduct of the company's affairs.

It is a correct statement of the law to state that s. 181 of the Companies Act 1965 is related to a winding up under the "just and equitable" ground under s. 218(1)(i) of the Companies Act 1965. So the cases decided on the "just and equitable" ground for winding up a company are equally applicable in the context of s. 181 of the Companies Act 1965 (*Re Novabron Pty Ltd (No: 2)* [1986] 11 ACLR 279, 292; and *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors and Another Application* [1994] 2 MLJ 789).

The question of whether there is oppression must certainly be decided by looking at the facts of each particular case. To constitute "oppression" under s. 181(1)(a) of the Companies Act 1965, the act complained of must be current (*Re Kong Thai Sawmill (Miri) Sdn. Bhd.; Kong Thai Sawmill (Miri) Sdn. Bhd. & Ors. v. Ling Beng Sung (supra); and Beh Chun Chuan v. Paloh Medical Centre Sdn. Bhd. & Ors* [1999] 7 CLJ 1). But some authorities tend to suggest that the court will take into consideration isolated acts of discrimination in the past. However, it is always prudent for the court to see whether or not there is a continuing state of oppression subsisting at the time of the hearing of the petition and whether there is a strong propensity for oppression (*Re Spargos Mining NL* [1992] 3 ACSR I; and *Re Chloride Eastern Industries* [1995] 4 MLJ 95). But where the petitioners knew that the company, for instance, was purchasing certain goods from a firm in which one of the directors had substantial interests and no objection was taken against it, then no complaint can be advanced that such a conduct amounted to non-disclosure or that it constituted oppression of the minorities (*Re Senson Auto Supplies Sdn. Bhd.* [1988] 1 MLJ 326). In *Re Sin Lee Sang Sawmill (Miri) Sdn. Bhd.; Leong Thong & Anor v. Chong Thim & Ors.* [1990] 1 MLJ 250, there were serious allegations made against the directors that the company's accounts had not been lodged with the Registrar of Companies, and that there were serious irregularities in the accounts which had been manipulated and that the company was in serious financial difficulties. The court rejected the petition because it was found that the petitioners were in control of the management of the company and, consequently, the petitioners could not even suggest that the affairs of the company and the powers of the directors had been exercised in a manner oppressive to the shareholders under s. 181 of the Companies Act 1965.

(b) Disregard Of A Member's Interests

That would involve in plain language the failure to take into account the minority's interest. There must certainly be an acute awareness of that interest and the decisive decision to override it or to brush it aside or even to set aside the company's procedure. In the words of Lord Wilberforce in *Re Kong Thai Sawmill (Miri) Sdn. Bhd. (supra)* at p. 229, "disregard" of a member's interests is said to "involve something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure". But the use of the word "disregard" in relation to the word "oppression" in s. 181 of the Companies Act 1965 suggests that these words are not to be used synonymously. There is indeed a certain degree of overlapping. Lord Wilberforce in *Re Kong Thai Sawmill (Miri) Sdn. Bhd. (supra)* explained the operation of s. 181 of the Companies Act 1965 in this way:

> The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made … their Lordships would place the emphasis on 'visible' … Neither 'oppression' nor 'disregard' need be shown by a use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at some identifiable point of time, can be held to have crossed the line.

(c) Unfair Discrimination

It envisages a situation where one group of members is given a benefit which other members are not given or where one group of members has to suffer some detriment or liability while the others are not subject to that kind of treatment. There is an element of unfair discrimination. For instance, a class or a group of members is given a certain benefit because of its membership of that class. The test has always been whether as between these two opposite parties, that is, between the "haves" and the "have-nots", the discrimination can be justified by looking at the benefit of the company as a whole.

The question to pose is this: when is conduct unfairly prejudicial or unfairly discriminatory? Perhaps the best answer is found in the case of *Wayde v. New South Wales Rugby League Ltd* [1985] 3 ACLC 799. There the court held that to be actionable the conduct must be unfairly prejudicial or discriminatory. That was a case where the Rugby League sought to remove Wests Rugby Club. It did this in accordance with its rules and with the aim of improving the game and advancing the objects of the company, even though the decision clearly prejudiced and discriminated against Wests Rugby Club. The latter claimed that this act was oppressive, unfairly prejudicial or unfairly discriminatory. Unfortunately, Wests Rugby Club's action failed. The court held that the Rugby League had acted in good faith in advancing the objects of the game; and whilst the act may have prejudiced or discriminated Wests Rugby Club, it was not unfair. The court too held that the question of unfairness was one of fact, to be decided having regard to the circumstances of each case.

Everything would be dependent on the facts of each case and every fact would be assessed diligently by the presiding judge.

(d) Prejudice

It is not a term of art. It has been defined by English judges to mean, in the context of their equivalent statutes, "causing prejudice, detriment to rights or interests" (*Re A Co* [1983] Ch 176). Prejudice would often exist when a member is affected in a detrimental way by a proposed act or resolution. But the word "unfair" is not employed in s. 181 of the Companies Act 1965 to characterise prejudice. But nevertheless, in my considered view, an unjustifiable detriment caused to a member would certainly entitle that member to the necessary relief. Everything must be viewed objectively. Thus, if an act or resolution affects a particular member in a detrimental way but is nevertheless beneficial to the company as a whole in the objective sense then the relief under s. 181 of the Companies Act 1965 will not be accorded.

The English courts in construing their s. 459 which is the equivalent to our s. 181 of the Companies Act 1965 have set out the approaches to be adopted in dealing with prejudice generally. For instance, in *Re A Company (No: 005134 of 1986), ex p. Harris* [1989] BCLC 383, at 389-390, Peter Gibson J succinctly said:

> (1) The test of unfair prejudice is objective. (2) It is not necessary for the petitioner to show bad faith. (3) It is not necessary for the petitioner to show a conscious intention to prejudice the petitioner. (4) The test is one of unfairness, not unlawfulness. Counsel for the respondents, however, has submitted that the test is objective, it was irrelevant that the respondent may have acted for an improper purpose or with an improper motive. I do not doubt that if the objective bystander observes unfairly prejudicial conduct by a respondent, the fact that the respondent had a proper purpose and a proper motive will not prevent that conduct from falling within the section. But if the objective bystander observes that the conduct of the respondent was for an improper purpose or with an improper motive, that may well be a relevant consideration in determining whether the conduct is unfairly prejudicial.

The concept of unfair prejudice was relied upon by Hoffmann J in *Re Posgate & Denby (Agencies) Ltd* [1987] BCLC 8, 14. There his Lordship said:

> The concept of unfair prejudice … enables the court to take into account not only the rights of the members under the company's constitution, but also their legitimate expectations arising from the agreements or understandings of the members *inter se*. There is an analogy in Lord Wilberforce's analysis of the concept of what is 'just and equitable' in *Ebrahimi v. Westbourne Galleries Ltd* [1973] AC 360.

In the same vein, Derrington J had this to say in *Re Novabron Pty Ltd (No: 2)* [1986] 11 ACLR 279, 292 (the Supreme Court of Queensland):

Further for the determination of the rights, expectations and obligations inter se of the persons behind it, a company is more than a mere judicial entity, and those rights are not necessarily merged into its structure: *Ebrahimi v. Westbourne Galleries Ltd* [1973] AC 360. Although that case was decided on the 'just and equitable' provision, in this respect precisely the same considerations apply to section 320, where the relationship of those persons *inter se* is the foundation of the remedy.

To The Heart Of The Matter

Earlier, in the course of this judgment, I have alluded to the grievances of the petitioner as reflected in encl. 2 at paras. 17 to 24. I will now examine these grievances.

(i) Irregular Financial Transactions

Sometime in August 2001, the petitioner discovered that there had been irregular financial transactions by the second, the third and the fourth respondents who were the majority shareholders and/or directors purportedly acting on behalf of the company in that on numerous occasions the second respondent had authorised on behalf of the company payment of a monthly sum of RM200 each to the third and the fourth respondents who were the inactive partners without the petitioner's agreement and without any basis whatsoever.This allegation was refuted by the respondents. *Vide* para. 18 of encl. 4, the second respondent who is the managing director of the company claimed that the payment of RM200.00 was disbursed as allowances to the remaining directors of the company namely the second, the third, the fourth and the fifth respondents bearing in mind that the company was reimbursing the petitioner on the interest charges on the said facility as alluded to earlier. But the contentions of the respondents were said to be untenable for the following reasons:

(1) there was no agreement to pay allowances to the third and the fourth respondents because they were inactive partners and not working directors;

(2) that it was illogical on the part of the respondents to compare the payment of RM210 towards servicing the petitioner's interest charges for the loan taken with the allowances to the third and the fourth respondents who were inactive directors and the second respondent's siblings; and

(3) that if the respondents' contention was correct in that the payments of those sums were meant for 'the remaining directors', why were such payments made only to the third and the fourth respondents and not to the second and fifth respondents?

So, it was submitted and I agreed that the inescapable conclusion would be that the said payment of RM200 was in the nature of an unauthorised payment. It did not matter that the amount involved was only RM200 and not RM2 million. The quantum would be negligible. It was wrong to do so. Of pertinence would be the fact that the respondents were in default. In *Eric Lau Man Hing v. Eramara Jaya Sdn Bhd & Ors* [1998] 3 CLJ Supp 126, the learned judge in the person of Selventhiranathan J found for the petitioner in s. 181 of the Companies Act 1965 petition as there were irregular financial transactions by the respondents there who were the majority shareholders similar to the situation at hand. In *Re Coliseum Stand Car Service Ltd. Abdul Khalik v. Mohamed Jee & Ors.* [1972] 1 MLJ 109, Abdul Hamid J (who later became the Lord President of the Supreme Court), in style, said at p. 112 of the report:

> It is also apparent that the first respondent had freely exercised the authority as though he alone was the shareholder when he appointed his own son as manager and paid him a monthly salary of $500.
>
> As regards the two loans, one to himself and the other to his son, although it would appear that they had been repaid, there is nothing to show that these loans were made for the benefit of the company. To my mind it constituted an improper use of the company's funds. It was quite improper for the company, controlled entirely by the first respondent, to authorise the use of the company's funds for a purpose unconnected with the company's affairs.
>
> On the evidence before me, it would also appear that the first respondent has not adequately disclosed the circumstances relating to the renting of the first floor of the premises. If it was rented out, where are the rents received? If they had not been rented out then it is for him to show that it was used either by or for the benefit of the company.
>
> In the circumstances of this particular case, I think the applicant has established to my satisfaction that the first respondent had conducted the affairs of the company without proper regard to his (applicant's) interests. To my mind it is not unreasonable to hold that it constituted an oppression on minority shareholders.

(ii) Breach Of Agreement To Repay The Loan

By way of a rebuttable, so to speak, to the petitioner's stand against the second respondent in regard to the issue of the unauthorised payments to the third and the fourth respondents as aforesaid, the second respondent proceeded in the month of September 2001 to cause the company to stop reimbursing the petitioner of the interest charges paid to the bank on the said facility. To add salt to the injury, the second respondent further prepared a circular to be signed by the shareholders of the company which in effect will stop all payments to the petitioner for the interest charges and also the unauthorised payments to the third and the fourth respondents as alluded to earlier. The petitioner took exception to the circular when that circular carried the information that the

directors had agreed to stop payment of RM210 towards the interest charges because the second and the fifth defendants did not sign the said circular. For this purpose, it would be ideal to see the copy of the unsigned circular dated 24 October 2001 that was prepared by the second respondent's wife by the name of Everlyn Yap Siew Hong marked as exh. "TKH11" of encl. 2 at p. 79 to p. 80 thereof. It seemed that the petitioner refused to sign the said circular and that, since October 2001, the company had stopped reimbursing the petitioner of the interest charges that were paid to the bank on the said facility right up to this day. For a further elucidation on this point, reference should be made to the copy of the statements of accounts from the bank which has now been acquired by Malayan Banking Berhad marked collectively as exh. "TKH12" of encl. 2 at p. 81 to p. 85 thereof.

(iii) Inaccessibility To The Accounts

It was undisputed that the Company's accounts was initially to be handled by the second respondent's wife by the name of Everlyn Yap Siew Hong with a view to replace her once the Company's financial position improved (see the averment at para. 26 of encl. 4). But this was never done. The problem was compounded further by the fact that all the accounts, cash books, general ledgers, journals, books and working papers were kept in the second respondent's house at no: 11A, Jalan USJ 2/2F, 47600 Subang Jaya, Selangor Darul Ehsan. The petitioner made numerous requests to inspect the books and the accounts but he was denied access despite the assurances that were given by the second respondent or his wife.

(iv) The Removal Of The Petitioner As A Director

In the second annual general meeting ("AGM") of the company which was held on 22 February 2002, the second respondent together with the fifth respondent conspired to remove the petitioner as a director of the company by voting against the petitioner's re-election as a director and that the petitioner had to retire under the Company's Articles of Association. No reason was given at all by the respondents for that decision.

It was the stand of the petitioner that the second and the fifth respondents have exercised their voting power in bad faith and for a collateral purpose in that it was to exclude the petitioner from the management of the company. Currently, the petitioner is only the shareholder of the company and no longer takes part in the management of the company (see a copy of the minutes of meeting of the AGM marked as exh. "TKH15" of encl. 2). And a perusal of the minutes of the meeting of the AGM in the year 2002 as exhibited in "TKH15" of encl. 2 showed that the second and the fifth respondents who were members and shareholders of the company voted in favour of the re-election of the second respondent as the director. Since the fifth respondent was merely a nominee of the second respondent, it was expected that both these two respondents would

vote against the petitioner's re-election as a director in breach of the agreement between the parties. Exclusion from the management of the company was a severe blow to the petitioner. It is my considered view that the exclusion of the petitioner as a member of the management of the company constituted a breach of an express or an implied understanding to allow him to participate in the management of the company and that such a breach would justify the petitioner in seeking relief under s. 181 of the Companies Act 1965. And, in the context of a winding up, it has been held, time and again, that to deprive a member of his right to participate in the management of the company would run counter to and would be in contravention of an express or implied agreement to allow him to do so and this would justify winding up any company on the "just and equitable" ground (*Ebrahimi v. Westbourne Galleries Ltd (supra)*; and *Tay Bok Choon v. Tahansan Sdn. Bhd.* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24).

In regard to the issue of conspiracy, it was apparent that when the AGM was called for by the second respondent even before the accounts for the year 2001 was ready for discussion, the respondents had only one intention for holding the AGM and that was to remove the petitioner as the director (see a copy of the minutes of the meeting of the AGM marked as exh. "TKH15" of encl. 2). The case of *Tay Bok Choon v. Tahansan Sdn. Bhd. (supra)* would be a case in point. There a similar situation occurred where the petitioner who was the minority shareholder was removed as a director of the company. The petitioner petitioned for the winding up of the company under the just and equitable ground. The Privy Council allowed the appeal and found that it was just and equitable to wind up the company.

Now, the salient features of *Tay Bok Choon v. Tahansan Sdn. Bhd. (supra)* with the present case may be stated as follows:

(1) Both these two cases involved private limited companies and that the petitioners in both these two cases cannot, at their own free will, sell their shares to third parties. In the present case, the Articles of Association of the company particularly arts. 2 and 3 thereof (see exh. "TKH3" of encl. 2) provide that the directors may in their absolute discretion and without assigning any reason thereof, decline to register any transfer of any shares.

(2) The agreements in both these two cases stipulated that the petitioners were to participate in the management of the company.

(3) In both these two cases, the petitioners have taken loans on behalf of the companies and that they further stood as guarantors in the financing transaction. It must be recalled that, in the present case, the petitioner stood as guarantor to the finance company in the hire purchase of the said car belonging to the company bearing registration number WHV 2695 (see exh. "TKH10" of encl. 2 at p. 78).

(v) The Failure To Declare And Pay The Dividends

It must be borne in mind that there has not been any payment of dividends by the company despite the substantial profits made in the years 2000 and 2001 as can be seen from the reports and accounts of the first respondent for the year 2000 (see the reports and accounts of the first respondent for the year 2000 and the statement of accounts prepared by the second and the fifth respondents as at 1 March 2002 and marked as exhs. "TKH13" and "TKH14" respectively of encl. 2).

It was the contention of the second respondent that the company had been paying sales commission or bonus. But, there is a world of difference between sales commission or bonus and dividends. The former would be in the form of remuneration to the working directors who have reached the sales target while the latter pertained to the shareholder's entitlement which constituted the bone of contention of the petitioner. Now, with the expulsion of the petitioner as the director of the company, he would definitely not be receiving any dividend from the company (which incidentally has not been declared by the company) and neither would he be receiving any salary or bonus or commission from the company. The petitioner will always be and will always remain at the mercy of the respondents as to what and when he should receive anything out of the profits of the company *(Ebrahimi v. Westbourne Galleries Ltd (supra))*. At this juncture, by way of an analogy, it would be ideal to refer to the case of *Re Gee Hoe Chan Trading Co Pte Ltd* [1992] 1 CLJ 268; [1992] 4 CLJ (Rep) 383. That was the case where the court held that the non-payment of dividends in order to punish the petitioners for challenging the respondents' management of the company justified the necessary relief under s. 181 of the Companies Act 1965. Of course, that was a case which concerned a Chinese family company and like many other traditional Chinese businesses it was run with an iron fist and in a autocratic manner and so the court ordered winding-up.

(vi) That The Petitioner Was Stripped From Enjoying All The Benefits Of The Company And Denied Access To The Office

This case was indeed a sorry tale to recount. After the petitioner was removed as a director of the company, the second, the third, the fourth and the fifth respondents who were the majority shareholders and/or the directors of the company purportedly acting on behalf of the company proceeded to oppress, and disregarded the petitioner's interest. They too discriminated and committed acts on behalf of the company which were prejudicial to the petitioner and these acts were said to be continuing even at the time the petitioner filed the present petition. The prejudicial acts committed by the respondents may be stated as follows:

(a) From the month of February 2002, the company had stopped paying for the instalments for the said car to the finance company and the company too had terminated the corporate petrol card given to the petitioner for the payment of petrol.

(b) The company had also refused to pay for the road tax and the insurance premium for the said car.

(c) The company had also wrongfully withheld the petitioner's salary as the sales director as well as his claims for the months of February and March 2002.

(d) At approximately 6pm on or about the month of April 2002 – to be precise it was on April fool's day, when the petitioner returned to the office of the company, he noticed that a new set of locks had been changed without notification and that the set of keys to the locks were not given to him. Alarmed at this turn of event, the petitioner notified the second respondent by way of a letter dated 5 April 2002 as seen in exh. "TKH16" of encl. 2 at p. 108 to p. 109 thereof.

(e) The second respondent had by way of the company's letter dated 11 April 2002 as seen at exh. "TKH17" of encl. 2, *inter alia*, informed the petitioner that the change of the locks was due to security reasons and forthwith restricted the petitioner's access to the company to office hours only. The petitioner was also informed by the company that since he was no longer the director of the company he could no longer use the said car and that he had to return the same.

(f) The petitioner complied and he returned the said car to the company on 22 April 2002 (see the petitioner's letter dated 22 April 2002 marked as exh. "TKH18" of encl. 2 at p. 112 to p. 113).

(g) There was an allegation by the second respondent at paras. 29 and 30 of encl. 4 to the effect that the key and the lock of the office were missing and to this allegation the petitioner demanded strict proof thereof. It must however be noted that the said allegation was not raised in the company's letter dated 11 April 2002 as seen at exh. "TKH17" of encl. 2 at p. 110 to p. 111.

(h) The petitioner averred that since 22 February 2002 and extending right up to today, the petitioner had not been paid any salary at all.

(i) There was yet another allegation by the second respondent to the effect that the petitioner had entered the office and wrongfully removed six sets of key phones and the main phone without any authority whatsoever (see the averments at paras. 34 and 35 of encl. 4). By way of a rebuttal, the petitioner refuted such an allegation based on the following reasons (see para. 19 of encl. 5 thereof):

(i) That, at all material times, the respondents knew that the said key phones and the main phone belonged to the petitioner and not the company. It was averred that those keys were given to the petitioner by his associate by the name of SRM Production Services Sdn Bhd sometime in May 2000 and that the petitioner had lent those keys to the company. For this purpose reference to the invoices and the letter dated 30 July 2002 from SRM Production Services Sdn Bhd marked as exh. "TKH25" of encl. 5 would be ideal.

(ii) The fact that the company had installed and serviced those key phones did not mean that they belonged to the company. The petitioner was merely taking back what rightly belonged to him. To cover himself the petitioner had lodged a police report on 23 June 2002 in regard to the said incident (see a copy of that police report marked as exh. "TKH26" of encl. 5 at p. 118 to p. 119).

Certain general principles must be set out, at this juncture:

(1) anyone joining any company must understand that he may be outvoted by the majority;

(2) in order to control the company, one must have the majority vote and in that way there is some measure of guarantee that one may get one's way in running the company;

(3) a minority member who dislikes the idea of being a minority should sell out because being a minority he cannot rely on the court to help him change the decisions of the majority;

(4) majority decisions made honestly in managing the company will not be set aside by the court (*Re Tri-Circle Investment Pte Ltd* [1993] 2 SLR 523, 526) because the court will respect the majority decisions of the company; and

(5) the court will not assume nor take the role of a policeman out to police the affairs of the company (*Re Tong Eng Sdn Bhd* [1994] 1 MLJ 451, 456).

But that does not mean that the majority may simply "bully" the minority because there is a mechanism to prevent a majority from abusing their power to bind and shackle the minority. In our country, there is a statutory control of the potential abuse of the majority's voting power. It is found in s. 181 of the Companies Act 1965 and it is known to all law students as the remedy for oppression. Section 181 of the Companies Act 1965 covers other grounds other than "oppression". It covers matters pertaining to "disregard of members' interests", "unfair discrimination against members" and "prejudice" to members

at large. In this judgment, all these have been discussed in the context of the facts that have been alluded to earlier. Dominance in any company is not reflected by the number of shares one owns. The ability of a member to control other members or the ability of that member to dictate policy and control other members must be taken into account. A classic example would be the case of *Re Sin Lee Sang Sawmill Sdn Bhd* [1990] 1 MLJ 250 where the court held that the petitioners there were in control of the company even though they were the minority shareholders because they held the position of managing director and executive director. The court consequently dismissed the petition because the controllers could not be heard to say that the affairs of the company had been conducted in an oppressive manner towards them.

For the reasons as adumbrated above, I must hold that there was oppression and/or a total disregard by the majority shareholders of a minority shareholder's interests. There must be intervention by this court in the affairs of the company and grant the reliefs sought by the petitioner otherwise the second, the third, the fourth and the fifth respondents will continue to oppress, disregard the petitioner's interest, discriminate and commit acts on behalf of the company that would be prejudicial to the petitioner. It must be borne in mind that the petitioner had been excluded from and was prevented from participating in the management of the company despite an implied agreement between the second, the third and the fourth respondents together with the petitioner as the founding partners and directors of the company and that unless this court intervenes in the affairs of the company and grant the reliefs which the petitioner sought then the latter will continue to be deprived and be excluded from the management of the company. There was evidence of a complete breakdown of mutual confidence and good faith between the petitioner and the second respondent who was described as the chief protagonist in the whole episode. Nothing can be more telling than to produce the averment of the second respondent in his own words as reflected at para. 36 of encl. 4 where he said:

> There is no oppression on the petitioner except that the petitioner has personal problems with myself and is unable to work with me.

The same scenario can be seen in the case of *Varusay Mohamed Shaik Abdul Rahman v. SVK Patchee Bros (M) Sdn Bhd* [2002] 3 CLJ 741, a decision of the Court of Appeal where Mohd Noor Ahmad JCA delivering the judgment of the Court of Appeal aptly said at p. 681 of the report:

> On the facts of this case, especially where the pre-existing partnership had been converted into a limited company and run as a family business, it is our considered view that the company was formed and continued on the basis of a personal relationship involving mutual confidence. By reason of the allegation as proved either taken as a whole or in part, in particular grievances (i), (ii) and (iv), it is manifestly clear that the parties no longer enjoyed the

confidence of each other. This fact provided convincing evidence of the breakdown of mutual confidence and good faith among the parties to justify the winding up on the just and equitable ground. We are fortified in our view by what was deposed by SD 2 who is the head of the other faction when questioned by the court. He said:

> Varusay **(the appellant)** is our cousin brother, his relationship is not good with me and my whole family. We are not on speaking terms since 1992. It's family problem, we can't work together (see p 162A of the appeal record). (emphasis added).

That statement sealed the fate of the company.

In the premises, unless the respondents being the majority "buy out" the petitioner, there was no other alternative open to the petitioner except to seek the order of this court to wind up the company and that a liquidator be appointed accordingly. Meanwhile, the petitioner had proposed that Mr. Wong Weng Foo be appointed as the liquidator of the company (see the consent to act signed by the said gentleman as seen in encl. 9).

The Rebuttals To The Respondents' Arguments

Lest there be an accusation of an oversight, I must now proceed to allude to the respondents' arguments and the rebuttals thereto.

It was certainly untrue that the petitioner was aware and consented to the payment of and agreed with the payment of the monthly sum of RM200 to the third and the fourth respondents who were the inactive partners. The petitioner was merely one of the signatories to the cheque account of the company. Moreover, the respondents have failed to establish this allegation in their affidavit in encl. 4.

It was also untrue that the second, the third and the fourth respondents advanced loans to the company because the deponent of the respondents' affidavit in encl. 4 did not raise this issue at all.

I cannot help but note, with regret, that the respondents failed to appreciate the facts in the present case. It must be emphasised that the petitioner's complaint in this s. 181 proceeding was in regard to the breach of the agreement by the respondents in causing the company to pay the monthly sum of RM210 to the petitioner as reimbursements of the interest charges incurred by the petitioner for the facility with the bank. The charges were incurred because the petitioner had to borrow in order to contribute towards his shareholding of 30% in the company. In fact, a sum of RM30,000 was paid by the petitioner towards this purpose. At the same time, the petitioner had advanced or loaned another sum of RM30,000 to the company upon the request of the second respondent. This amount was free from interest and it was repayable on demand.

Since the company had failed to refund the said sum to the petitioner despite a demand being issued, the petitioner had no choice but to proceed to present the winding-up petition *vide* petition number D7-28-98-2002 against the company. All these facts can be seen in the petitioner's affidavit in encl. 2 particularly at paras. 9.4. to 9.9 thereof. In regard to the issue of the presentation of the winding up petition, the petitioner had lucidly explained this issue in paras. 6.1 to 6.5 of the petitioner's affidavit in reply as seen in encl. 5 (see the copies of the relevant affidavits relating to the winding up petition marked as exhs. "TKH20", "TKH21" and "TKH22" of encl. 5). So it can be surmised that the issue of the winding-up petition has no place in this proceeding because the winding-up petition concerned the inability of the company to pay its debt which was in relation to the advancement of money or loan in the sum of RM30,000 by the petitioner. The present case before me concerned, *inter alia*, the issue of oppression of the petitioner's rights as a shareholder of the company. Now, the fact that both the parties entered into a consent order to withdraw the winding-up petition and settled the debt forthwith would incontrovertibly confirme that the company admitted the said debt. For this purpose, it would be ideal to refer to the consent order relating to the winding-up petition and the company's cheque for the sum of RM30,000 marked as exh. "TKH23" of encl. 5 at p. 107 to p. 109 thereof. Notwithstanding all these, the company should have continued with the civil suit it filed against the petitioner *vide* civil suit no: D3-22-212-2002 which was a suit filed by the company against the petitioner for, *inter alia*, an injunction to restrain the petitioner from commencing with the winding-up petition and for damages. But contrary to the respondents' present complaints, the company via its former solicitors withdrew the said civil suit without even obtaining the petitioner's consent on 3 June 2002. A copy of the notice of discontinuance can be seen in exhibit marked as "TKH24" of encl. 5 and it was dated 3 June 2002.

There was an allegation that the company's bank account was frozen as a result of the winding-up petition but the respondents failed to establish this allegation. Whilst it was true that the winding-up petition had been settled by way of a consent order, there was no evidence that the matter had been settled on the ground of without any admission as to liability on the part of the company. If that was the case, one question crops up: why would the company discontinue the civil suit against the petitioner? It must be emphasised that the petitioner was not using the issue of the failure to repay the loan of RM30,000 as a ground for the petitioner to seek relief pursuant to s. 181 of the Companies Act 1965. A perusal of enclosure one (1) and the relevant affidavits would confirm all that. The present petition in enclosure one (1) should not be confused with the winding-up petition filed by the petitioner against the company *vide* petition number D7-28-98-2002.

In regard to the inaccessibility of accounts, I have this to say. Surely the fact that the petitioner was one of the cheque signatories did not mean that he had access to the company's accounts. It must be recalled that to a certain extent by putting the second respondent's wife to handle the accounts would mean that a situation of conflict of interest may arise implicating the second respondent.

It was the stand of the petitioner that the respondents have come to court with unclean hands. It must be noted that the respondents have failed to disclose to this court that the issue of the winding-up petition had been settled by way of the consent order. The respondents too have failed to disclose that they had caused the company to withdraw the civil suit against the petitioner. But for the purpose of enclosure one (1), all these facts would not be relevant at all.

I have perused the relevant affidavits with utmost care and with that measure of circumspection. I too have considered all the submissions of the parties and I have concluded, based on the available evidence, that:

(1) the petitioner did not have access to the accounts of the company;

(2) the petitioner was removed as a director without any basis whatsoever;

(3) there was only one petition to wind up the company and not two as alleged by the respondents – which allegation was also unsubstantiated;

(4) the petitioner's offer to the second respondent to buy his shares was only made after his expulsion as a director of the company and by then all mutual confidence and relationship between the petitioner and the second respondent, being the founder members of the company, had broken down; it was only natural that the petitioner being the minority shareholder made a proposal to the second respondent who was the controlling shareholder to buy him out;

(5) the respondents' complaint of this purported collateral purpose of the petitioner in filing this petition was not supported by the respondents' affidavits;

(6) there were definitely financial improprieties in the running of the company since the respondents had caused the company to make illegal payments to the third and the fourth respondents and when confronted by the petitioner, the second respondent caused the company to renege on the repayment of the interest on the overdraft; and

(7) having agreed that the petitioner would have active participation in the management of the company, the removal of all the benefits granted to the petitioner constituted discrimination *per se.*

Despite the fact that the petitioner no longer took an active part in the management of the company, the petitioner:

(i) remained the guarantor to the hire purchase of the said car with the finance company;

(ii) continued to be the borrower in the said facility with the bank; and

(iii) had charged the property belonging both to himself and his wife to the bank as security for the said facility.

Brennan J in *Wayde v. New South Wales Rugby League Ltd* [1985] 10 ACLR 87 spoke of the Australian equivalent to s. 181 of the Companies Act 1965 in these words:

> (The section) requires proof of oppression or unfairness: proof of mere prejudice to or discrimination against a member is insufficient to attract the court's jurisdiction to intervene. In the case of some discretionary powers any prejudice to a member or any discrimination against him may be a badge of unfairness in the exercise of the power but not when the discretionary power contemplates the effecting of prejudice or discrimination … At a minimum, 'oppressive' imports unfairness and that is the critical question in the present case.

This dicta of Brennan J was quoted favourably by Beach J in *Phosphate Co-operative Co of Australia Ltd v. Shears* [1987] 12 ACLR 649, 653.

Unfairness seems to be the root word and the essence of "oppression". Here, in the present case, there was certainly unfairness meted out to the petitioner by the respondents in big doses. But the word "oppressive" cannot be read in isolation. It must be taken as a "composite whole" after taking into consideration all the other factors as set out in s. 181 of the Companies Act 1965. Thus, in the words of Young J in *Morgan v. 45 Flers Avenue Pty Ltd (supra)* at ACLR reporting at p. 704:

> … it has been accepted that one no longer looks at the word 'oppressive' in isolation but rather asks whether objectively in the eyes of a commercial bystander, there has been unfairness, namely, conduct that is so unfair that reasonable directors who consider the matter would not have thought the decision fair … in my view, a court now looks at (the Australian equivalent of section 181) as a composite whole and the individual elements mentioned in the section should be considered merely as different aspects of the essential criterion, namely commercial unfairness.

Conclusion

For the reasons as adumbrated above, I made the following orders:

(a) I granted an order in terms of enclosure one (1) prayer (1) (ii) of para. 20.

(b) I also granted an order in terms of enclosure one (1) prayers (2) (i), (2) (iii) of para. 20. In so far as enclosure one (1) prayer (2) (iii) of para. 20 was concerned, Mr. Wong Weng Foo was appointed as the liquidator of the company (the first respondent).

(c) I too granted an order in terms of enclosure one (1) prayer (4) and prayer (5) of para. 20.

(d) I then ordered the closure of the file.